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NO. 81-2381

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

TODD SHIPYARDS CORPORATION, et al.,
Petitioners,

v.

NORMAN C. ALLAN, et al.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF NORMAN C. ALLAN, RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, for purposes of the statute of limitations of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 913(a), respondent Allan sustained an "injury" at the time his medical condition was correctly diagnosed and he therefore became aware of the full extent, and compensable nature, of the harm to him.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 666 F.2d 399. An earlier opinion of the court of appeals (Pet. App. F) dismissing a petition for review of the Benefits Review Board's initial decision for lack of a final order is not reported. The decisions of the

Benefits Review Board (Pet. App. E1-E9, I1-115, K1-K8) are reported at 2 Ben. Rev. Bd. Serv. (MB) 351, 8 Ben. Rev. Bd. Serv. (MB) 570, and 12 Ben. Rev. Bd. Serv. (MB) 589 respectively. The decisions of the administrative law judges (Pet. App. C1-C34, G1-G18, H1-H5, J1-J6) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1982. A petition for rehearing was denied on March 25, 1982 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on June 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On December 9, 1971, respondent Normal Allan, a shipwright for petitioner Todd Shipyards Corp. (Todd), was injured during the course of his employment when a 10-pound piece of metal fell on his neck

and shoulder (Pet. App. A2, C6, E2). Allan experienced pain and dizziness from the blow but, after receiving some aspirin from Todd's first aid facilities, continued to work the rest of the day (ibid.). On the following day, Allan was referred by Todd to Dr. Irving Tobin, an orthopedist (id. at A3, C7, E2). Dr. Tobin diagnosed Allan's condition as "post occipital headache" and "cervical myosis" (ibid.). Dr. Tobin informed Allan that his X-rays were normal and told him that he had a bad bruise, "which would go away in time" (id. at A3, C7, E3). Dr. Tobin gave Allan a prescription for pain medication and released him for work (ibid.).

Allan returned to work, but his headaches and pain persisted (Pet. App. A3, C8, E3). Allan visited Dr. Tobin again in July 1973, and the doctor again told him that he had nothing more than a bad bruise (ibid.). Allan visited Dr. Tobin for a

third time in November 1973, and additional X-rays revealed a change in appearance between the fifth and sixth vertebrae (ibid.). Dr. Tobin diagnosed the condition as a degenerative disc, which he told Allan might be a result of the December 1971 accident (id. at C8-C9). Dr. Tobin referred Allan to a neurosurgeon, who diagnosed Allan's condition as progressive spondylosis initiated by the earlier accident (id. at A4, C9, E3). In January 1973, Allan underwent surgery for an anterior disc removal and fusion (id. at A4, C10-C11, E3-E4). On March 17, 1974, Allan returned to work (id. at A4, C11). Allan filed a claim for disability compensation under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 et seq., on April 5, 1974 (Pet. App. A4, C12, E4).

2. After a hearing, an administrative law judge, applying the version of the

Act's one-year statute of limitations that existed before the 1972 amendments to the LHWCA, ruled that Allan's claim was time-barred (Pet. App. C33). Because Allan at all times associated his pain with his earlier accident, the administrative law judge concluded that Allan was aware of his injury from the outset and therefore, for purposes of this case, "'injury' means the date of accident" (id. at C30-C31). The administrative law judge expressly rejected Allan's claim that his "injury," within the meaning of Section 13(a) of the Act, 33 U.S.C. 913(a), occurred when he first became aware that his accident could result in some disability (Pet. App. C16).

Applying the amended statute of limitations, the Benefits Review Board reversed. The Board ruled that, under a proper reading of the statute, the "injury" did not occur until Allan could reasonably have been expected to know that he had

suffered a compensable injury that could be expected to reduce his earning power, and this did not occur until his condition was correctly diagnosed (Pet. App. E5-E6). Until that time, the Board concluded, Allan's injury was "latent or unknown", and therefore the statute was not running (id. at E7). The Board explained (id. at E6-E7): "To hold otherwise would lead to harsh and incongruous results in those cases where the true nature and seriousness of an injury is not evident to either the claimant or his doctor during the claims period." The Board then remanded the case to the administrative law judge for further action (id. at E9).

After another appeal to the Board and remand on the issue of the degree of loss of wage-earning capacity (see generally Pet. App. K2-K4), the Board affirmed a compensation award to Allan (id. at K1-K8). The court of appeals affirmed (id. at

A1-A13). The court agreed with the Board that, under the amended statute of limitations, the touchstone for determining when the injury occurred was when the employee knew, or had reason to know, "that there was an injury in the sense contemplated by § 13(a)--an impairment of earning power" (id. at A8). Because the earliest date that Allan acquired such knowledge was November 1973, when X-rays showed a change in his vertebrae, the court held that Allan's April 1974 claim was not time-barred (ibid.).

ARGUMENT IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioner's urge two bases for granting the Petition for Certiorari, claiming:

1. The circuit court of appeals' decision herein is in conflict with a prior decision of this Court, Pillsbury v. United Engineering Co., 342 U.S. 197, and

2. Decided an important question of Federal law which should be settled by this Court.

THE CIRCUIT COURT DECISION DOES NOT CONFLICT WITH PILLSBURY V. UNITED ENGINEERING CO.

Pillsbury v. United Engineering Co., 342 U.S. 197, a 1952 case, expressly excluded from its purview the issues herein when it stated "we are not here dealing with a latent injury or an occupational disease", Pillsbury v. United Engineering Co., 342 U.S. 197, 199. The Pillsbury decision involved four cases which differed materially on their facts from this case. In each of the four Pillsbury cases the true nature of the industrial injury was known and identified from the beginning, whereas Norman Allan's compensable condition did not exist at the beginning but only came into being later and was not correctly identified by the yard doctor or the neurosurgeon until X-rays were taken

in November of 1973 nearly two years after the traumatic event causing his condition. In short, Allan's condition was latent and was the type of an injury specifically excluded from the language of Pillsbury.

Pillsbury was decided under the pre-amendment wording of 33 U.S.C. 913(a). The statute was amended in 1972 to read:

> Sec. 13. (a) Except as otherwise provided in this section, the right to compensation for disability or death under this Act shall be barred unless a claim therefor is filed within one year after the injury or death. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred. The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

(amending language underlined).

The Ninth Circuit followed Stancil v. Massey, 436 F.2d 274 (D.C. Cir. 1970) because of the statutory language and the factual similarity with that case. The Stancil claimant sustained a mild back strain for which he received treatment by a company doctor for a couple of years until he was admitted to a hospital for new treatment and for the first time learned that he had a herniated disc. The evidence established that the physician treating him revised his diagnosis for the first time after the operation. Norman Allan, likewise, was treated by a company doctor who told him he was suffering from a muscle strain which would go away and it is undisputed that the protruded disc problem in Norman Allan's neck was not diagnosed until November of 1973. The Benefits Review Board applied the principles of Stancil v. Massey, herein and the Ninth Circuit affirmed.

Although petitioner no longer argues that the pre-1972 language should apply, it argues that the amended statute changed nothing and the date of injury is the date of a traumatic event notwithstanding the fact that Norman Allan's disabling condition could not be diagnosed because it did not exist until at least two years after the traumatic event.

The 1972 amendment to Section 913(a) manifests Congress' intent that the limitations period not begin to run until an employee knows, or should know, that he has a claim under the statute. Section 913(a) was amended to provide explicitly that the one-year claims period be tolled until the employee is or should be aware of the relationship of his injury to his employment. The decision of the court below, that the time for filing a claim here did not begin to run until respondent Allan had reason to know the extent of the harm

caused by the accident and its likely compensable nature, is a necessary complement to this rule.

This is also consistent with the Act's definition of injury (33 U.S.C. § 902(2)) which defines injury as " . . .'such occupational disease or infection as arise naturally out of such employment or or naturally or unavoidable result from such accidental injury' . . ."

THE CIRCUIT COURT DECISION APPLIES A WELL KNOWN PRINCIPLE OF WORKERS' COMPENSATION LAW WHICH AND DOES NOT WARRANT REVIEW BY THE SUPREME COURT

The petitioner raised a number of questions before the Circuit Court, including a contention that the 1972 change in the Statute of Limitations was not procedural and did not apply to this claim, a contention that there could be no lost earning power in the absence of actual wage loss, a contention that the Statute of Limitations had run on the claimant before

there was a compensable loss and a contention that the Statute of Limitations had run on the claimant before his condition was ever correctly identified and diagnosed. The Circuit Court followed orthodox Workers' Compensation Law in ruling on each of these points, finding that the 1972 Statute of Limitations did apply, in reliance on earlier orthodox Workers' Compensation authority, finding that the method of proving and calculating loss of earning power compensation was proper, in reliance upon earlier orthodox Workers' Compensation authority and finding that the claim was timely filed, relying upon both the amended statute and earlier orthodox authority.

Nothing about the Circuit Court decision departs from the accepted standards of Workers' Compensation jurisprudence and nothing about it is new or astonishing to any tribunal that deals with

these subjects. These questions are all important to Norman Allan but we submit that they do not amount to an "important question of Federal law which should be settled by this Court".

The petitioner, likewise, claims that the finding of the administrative law judge that the claim was time-barred was supported by substantial evidence and could not be overturned by the Benefits Review Board. As pointed out by the Circuit Court the decision of the administrative law judge clearly indicated that he was deciding the question under the pre-1972 statute which made his decision erroneous as a matter of law since he used the wrong test, and further the Circuit Court affirmed the Benefits Review Board's finding that the administrative law judge erred in failing properly to apply the legal principles of Stancil v. Massey and on these two legal grounds the Circuit Court upheld the

Benefits Review Board's reversal of the administrative law judge's decision on the statute of limitations.

CONCLUSION

For the reasons stated the Petition for Certiorari should be denied.

Respectfully submitted,

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